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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 183.

HENRY W. GRUNEWALD,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF THE PETITIONER.

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Opinions Below.

The opinions of the Court of Appeals (Appendix V, pages 288a, 316a, 381a) are reported in 233 F. 2d 556-598.

Jurisdiction.

The judgment of the Court of Appeals was entered April 10, 1956 (App. V, page 358a). Petitions for rehearing were denied June 1, 1956 (App. V, page 394a). Petitions for writs of certiorari were filed June 21, 1956 and granted October 15, 1956 (R. 984). Jurisdiction is invoked under 28 U. S. C. 1254 (1).

Questions Presented.

1. Whether conviction of a conspiracy to procure from the Fraud Bureau of the Internal Revenue Department a decision not to prosecute a tax fraud, where the object of the conspiracy had been accomplished by January, 1949, and prosecution was barred under the statute of limitations by January, 1952, may be sustained, on the theory that the conspiracy must have included a continuing agreement to conceal—the indictment having been found October 25, 1954, and the proof being that one or more of the conspirators in March, 1952, attempted to cover their tracks from investigators.

2. Whether independent acts of alleged conspirators, after the accomplishment of the object of the conspiracy and done without the knowledge or the participation of the petitioner Grunewald, may suffice to support a charge against him that the original conspiracy included a continuing purpose to conceal so that the conspiracy might be deemed to extend down to the last act of concealment.

3. Whether an alleged continuing conspiracy to conceal could be found as to the petitioner Grunewald, when he was concerned only with the original object of the conspiracy and was acquitted by the Trial Court on three counts of attempting to influence witnesses, which the Court charged the jury could be acts of continuing concealment.

4. Whether a purpose to continue to conceal the accomplishment of the primary conspiracy may be inferred from the fact that the conspirators would be presumed to know that their activities would always be open to investigation —whether a subordinate conspiracy to conceal may be implied from the original crime.

5. Whether the Trial Court committed error in permitting the jury to find a continuing conspiracy to conceal from the fact that, more than three years after the object of the conspiracy had been accomplished, the petitioner Grunewald, when his secretary was subpoenaed before a grand jury, told her she need not answer various questions and could say she forgot.

6. Whether the Trial Court committed error in permitting the defendant Halperin, the only witness for the defense, to be cross-examined, for the purpose of impeaching his credibility, on the fact that he had been, prior to the trial, subpoenaed before a grand jury and had there claimed his constitutional privilege against self-incrimination on a long line of questions.

Constitutional Provisions and Statutes Involved

Fifth Amendment

"* * * nor shall be compelled in any criminal case to be a witness against himself * * *."

Section 371, Title 18 U. S. C. A.

"371. Conspiracy to commit offense or to defraud United States:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Section 3282 Title 18 U. S. C. A.

(As applicable to offenses prior to 1954 amendment.)

"3282. Offenses not capital.

Except as otherwise expressly provided by law, no person shall be prosecuted, tried or punished for any offense, not capital, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed. June 25, 1948, c. 645, 62 Stat. 828."

Statement of Case.

In the Southern District of New York, the petitioner Grunewald (No. 183) and the petitioners Max Halperin and Daniel Bolich (Nos. 184, 186) were convicted on the first count of a seven count indictment filed October 25, 1954 (R. 2-4, 782). Grunewald was not a defendant on the second count and was acquitted by the Court on the remaining counts (R. 569). The other petitioners were convicted on additional counts (R. 3, 782). The conspiracy charge in count 1 was laid under 18 U. S. C. 371 and charged a conspiracy to defraud the United States in the administration of the revenue laws and to commit the offense of corruptly influencing witnesses before a Congressional Committee and Grand Jury for the purpose of concealing the crime (R. 4-7). Each of the petitioners was sentenced to five years imprisonment and fined on that count (R. 2, 3, 783).

The Court below affirmed, with Judge Frank at first concurring as to petitioners Grunewald and Bolich, but dissenting as to Halperin (App. V, 288a, 316a) and then, on petition for rehearing, dissenting as to all (App. V, page 381a). Judge Frank's original dissent as to Halperin was upon the ground that Halperin's rights had been violated by permitting his impeachment by cross-examination showing that he had claimed his privilege on these issues when called as a witness before a grand jury.

The second dissent was upon the ground that the statute of limitations would have barred conviction upon the theory on which the case was submitted to the jury and that at least a new trial would be necessary if the theory advanced in the majority opinion were sound.

In 1948, two firms, Gotham Beef Company and Pattullo Modes, Inc., there being no connection between the two, were separately being investigated by the Fraud Bureau of the Internal Revenue Department for income tax frauds (R. 285-6, 419). Both firms retained a New York law firm named Schopick & Davis (R. 300-301, 314-15). Sharing the office with the Davis firm, on a tenancy basis, was the petitioner, Halperin (R. 300).

Most of the elements of the government's case are shown in the testimony of Davis. He said that he asked Halperin for help in each case (R. 309, 313); that Halperin said he knew Grunewald, who was extremely influential (R. 309); that Halperin subsequently reported that Grunewald was willing to help (R. 313) and had agreed to help in the *Gotham Beef* case for $60,000 (R. 321). All this occurred in the period July-August, 1948 (R. 317-21).

Davis further testified that he asked Halperin to see if Grunewald could handle the *Pattullo Modes* case (R. 318); and that subsequently, in October, 1948, Halperin took Davis to Washington, introduced him to Grunewald and said, in Grunewald's presence, that the latter had agreed to accept $100,000 in the *Pattullo* matter, whereupon Davis thanked Grunewald, who said, "O. K." (R. 327-8).

At this time the administrative practice in the Fraud Bureau and the Internal Revenue Department was that the Special Agent would make an investigation and a report with his recommendation, which recommendation would then be reviewed by an immediate superior, then again reviewed by the technical adviser to the agent in charge of

the office (R. 294); then the matter went to the Penal Division of the Fraud Bureau and from there to the Washington office and then to the Attorney General's office (R. 295). In all of these steps, the only cases which went forward were those where there had been a recommendation for prosecution, confirmed by the person reviewing at the next higher level. If there were a determination of no prosecution anywhere along the line, the case ended at that point (R. 295-6).

The whole object of the conspiracy, therefore, was to obtain a no prosecution ruling, the theory being that Grunewald was a close personal friend of Bolich (R. 309) who, until September 1, 1948, was agent in charge of the New York office of the Fraud Bureau (R. 464) and thereafter was assistant commissioner of Internal Revenue (R. 465). This object of the conspiracy was expressed by Davis' clients as follows:

Mr. Marks (Pattullo Modes) (R. 31):

"Q. Was anything said about criminal prosecution? A. Well, when I say was satisfactory to us, that is the ends we were seeking at that time, to settle this matter in a civil way without criminal prosecution, and Mr. Halperin went to Washington to see his friend to attain that result for us.

The Court: By civil do you mean paying any taxes but avoiding a criminal prosecution? Is that what you mean?

The Witness: That is right, your Honor." and again (R. 32):

"Q. Did you have any discussion with Davis about how you would learn when you got this result? A. Mr. Davis told us that we would never get anything written from the Government that our case was going to be settled in a civil manner. He says all he could promise us that there would be a mem-

orandum put into our file that the case was to be settled on a civil basis."

Mr. Tobias (Gotham Beef Company) testified (R. 165-6):

"Now, the exact terms of the escrow • • • was • • • that until I were to have heard with my own ears from the special agent's office from a responsible official there that was to be no criminal prosecution in the Gotham matter • • • the money was not to be released."

To the same effect is testimony of Mr. Berman, one of the owners of Gotham Beef Company (R. 154-5).

In the *Gotham Beef* case, the object was accomplished and the ruling announced in October, 1948 and Davis testified that the money was paid (R. 325-6). In the *Pattullo Modes* case, the ruling was announced on January 10, 1949 and Davis, likewise, testified that the money was turned over on the 12th or 13th of January (R. 331-3).

There was further evidence that in June of 1950 Davis talked with a prospective client named Glover about handling a tax fraud case for Glover (R. 341), but after some discussions a fee could not be agreed upon and the Davis firm withdrew (R. 346-7).

In July and August, 1951, a Congressional Committee began an inquiry into tax cases and made some inquiries at Pattullo Modes (R. 38-9). Davis said to refer inquiries to him (R. 39). Davis then decided the Pattullo Modes people should have their own counsel and ultimately brought them to Mr. Boris Kostelanetz (R. 356). The latter advised that when they were subpoenaed before the Committee, they should claim their privilege, which they did (R. 41-3). Some months later, around January or February, 1952, the Pattullo people were subpoenaed to go before a Brooklyn Grand Jury and Mr. Kostelanetz arranged

immunity for them in return for their testimony (R. 44-5, 20-21). Davis suspected such an arrangement had been made and suggested that the Pattullo people consult another lawyer to see whether such a course was in their own best interests (R. 362).

In early 1952, and particularly in March, 1952, Davis or Halperin, or both, saw the Gotham Beef people, Mr. Berman and Mr. Tobias and suggested that they should not talk, but to stand on their constitutional rights (R. 149-50, 170-172). There was also talk about the publicity that the *Pattullo* case had received in the newspapers (R. 170).

In the same period, in the Spring of 1952, the petitioner Halperin was subpoenaed before the Brooklyn Grand Jury, but claimed his privilege on all matters in issue here. The court allowed such facts to be shown for the purpose of impeaching his credibility and adhered to the ruling over the strenuous objection of all counsel (R. 684-703).

In May, 1952, Mrs. Nancy Hain was subpoenaed before the Brooklyn Grand Jury (R. 531). She had been a secretary for Grunewald from June, 1949 to January, 1950 and again from June, 1950 to February, 1951 (R. 526). She knew generally that he was friendly with Bolich and Halperin (R. 527-9); paid his bills by cash (R. 527); and had said when people had tax problems, they brought them to him and he would get them fixed or fixed up (R. 530, 541). In a telephone talk with Grunewald after she received her subpoena, he offered to send her expense money and said that, as his confidential secretary, she did not have to divulge his personal business and could say she didn't remember (R. 532-3). She consulted her current employer, an attorney, returned the expense money, went to New York and answered the questions of the government attorneys in a private talk, though there were some things she did not remember and this was not quite truthful (R. 533-4).

Summary of Argument.

1. Concededly, the statute of limitations applicable to the conspiracy charged in count 1 was three years. This conspiracy to obtain the no prosecution decisions in the *Pattullo Modes* case and the *Gotham Beef* case was accomplished in January, 1949, when the desired rulings were made. The only other case considered, the *Glover* case, was abandoned in June or July, 1950, before any agreement was made, but is still beyond the limitation period. The indictment was not found till October 25, 1954. It was conceded that no act took place within the three years preceding the indictment except a possible act of concealment. Except for the concealment feature, therefore, prosecution would have been barred under the three year limitation. Motions for judgment of acquittal on the ground that the acts of concealment did not toll the statute were denied and the case submitted to the jury with instructions to acquit unless the original conspiracy included an agreement to conceal and an overt act occurred within three years.

The concealments relied upon were occurrences between three and three and one-half years after the no prosecution decisions were obtained. These concealments were essentially four items. The first three consisted of approaches by Davis or Davis and Halperin to witnesses from the Pattullo Modes and Gotham Beef companies, with the suggestion that they should stand silent and rely on their constitutional rights. These suggestions were made when Davis learned or suspected that the witnesses were about to testify. These approaches were charged as substantive offenses in counts 5, 6 and 7 of which Grunewald was acquitted by the Trial Court. In any case, they were, at most, attempts to avoid detection and punishment. The fourth

item was the remark of Grunewald to his secretary in May, 1952, that she did not have to divulge his personal affairs.

Attempts to avoid detection after a conspiracy has been accomplished cannot be overt acts done to effect the object of the conspiracy.

There was no proof that these acts had been contemplated at any time before the main conspiracy was accomplished. The principles stated in *Krulewitch* v. *United States,* 336 U. S. 440 and *Lutwak* v. *United States,* 344 U. S. 604, preclude implying an extension of the conspiracy from later acts of concealment, since these are in the nature of afterthoughts and a contrary rule would wipe out the statute of limitations altogether.

Moreover, the life of a conspiracy cannot be extended by a mere concealment. If it takes place before the main object is accomplished, it may have the dual purpose of accomplishing the main object and of avoiding detection. After the main object has been accomplished, the concealment is merely an effort to avoid detection. If innocent, it amounts to nothing. No man is required to confess a crime. If guilty means are used, it is a new and different conspiracy.

One may not be convicted of a single over-all conspiracy where there are two conspiracies and the first is barred by the statute of limitations, nor may anyone be convicted of a single conspiracy on the theory that a concealment after the main object has been accomplished is an overt act to accomplish that object sufficient to toll the statute of limitations.

The Trial Court instructed the jury that the indictment charged but one single conspiracy and that the statute of limitations would require the acquittal of the defendants unless it could be found that there was, within the life of the original conspiracy, an agreement to conceal it and that

an overt act occurred within the three year limitation. This permitted a conviction on the basis of an implied subordinate conspiracy to conceal, based on subsequent acts of avoidance. This was contrary to the ruling in the *Krulewitch* case and on such theory the defendants should have been acquitted. This acquittal was refused. Specific exception was taken in the instance where Grunewald was concerned in an act of possible concealment (R. 756-7) and motions to set aside the verdict were denied (R. 767). Exception was also taken to the failure to distinguish between different conspiracies (R. 752) and to the submission of the issue of concealment (R. 753, 757).

The majority opinion below first takes an erroneous view of the scope of the conspiracy and even then resorts to implications that the defendants must have known they would be investigated to justify an implication that the later acts of concealment were part of the original conspiracy. This still violates the principles stated in the *Krulewitch* and *Lutwak* cases. A single conspiracy charged and submitted to the jury was barred by the statute and the defendants should have been acquitted.

2. The principal argument and summary on the question of allowing cross-examination of the defendant Halperin on his claim of privilege is presented in Halperin's brief and we rely upon that brief. The error seriously affects this petitioner because the defendant Halperin was the witness for the defense who created a clear issue of fact by disputing every point of the government's contention that he had arranged and procured, through Grunewald, the no prosecution decisions. His credibility was a critical issue. The Trial Judge permitted him to be cross-examined for the purpose of impeaching his credibility by a showing that he had claimed his privilege when subpoenaed before the grand jury.

This was done on the theory that the prior claim of privilege creates inconsistency with the subsequent claim of innocence and may be considered by a jury as impeaching evidence. The ruling depends upon *Raffel* v. *United States*, 271 U. S. 494 (1926), which allowed a defendant, testifying on a second trial, to be impeached for failure to take the stand on his first trial. The *Raffel* case is believed not to be controlling and in any event to have been implicitly overruled by the decisions in *Johnson* v. *United States*, 381 U. S. 189, and *Slochower* v. *Board of Higher Education*, 350 U. S. 551. A distinction is also inherent in the difference between appearance on a trial in open court and appearance before the secret grand jury. A rule imposing a penalty for exercise of the constitutional privilege is wrong. It would also lead to permitting general secret examinations of prospective defendants or an alternative of destroying effective use of the right to testify at the trial.

ARGUMENT.

I.

Conviction of petitioner under the first count for conspiracy to corrupt the Revenue Bureau was barred by the statute of limitations. The proof did not justify a finding that the life of the original conspiracy was extended by an agreement to conceal to be implied from a later act of concealment. Mere concealment cannot extend the life of the conspiracy for the purpose of tolling the statute of limitations.

The charge of conspiracy in Count 1 is laid under Section 371, Title 18 U. S. Code. There is no dispute that the period of limitations applicable to this charge is three years (Section 3282, Title 18 U. S. Code; *U. S.* v. *McElvain*, 272 U. S. 633; *U. S.* v. *Witt*, 215 F. (2) 580 (C. A. 2)). The 1954

amendment changing the period to five years did not affect cases already barred (68 Stat. 1145, Chap. 1214, Section 10 (b)).

Section 371 makes it a crime to conspire to defraud the United States or to commit an offense against the United States. The indictment herein charged both objects to wit—to defraud the United States in the exercise of its governmental functions of administering the Internal Revenue laws and of detecting and prosecuting violations (R. 4)—and—to commit certain offenses against the United States, to wit: corruptly to influence and impede witnesses before a grand jury in the Eastern District of New York and witnesses before a Congressional Committee (R. 5).

Paragraph "7" of Count 1 charges it was a part of the conspiracy that the co-conspirators would make continuing efforts to avoid detection and prosecution through any means whatsoever, including bribery, improper influence of government employees, giving false testimony, influencing and impeding witnesses, obstruction of justice and presentation of false statements and documents to the Bureau of the Internal Revenue (R. 6).

Paragraphs 13 and 14 of Count 1 charge it was a part of the conspiracy that the conspirators would conceal the acts done by any means, including influencing witnesses before any governmental body, legislative, executive or judicial (R. 7).

This indictment, then, charges one continuous conspiracy, first, to corrupt the revenue, and second, to conceal the crime by influencing witnesses before a grand jury and a Congressional Committee. The Trial Court so ruled, saying (R. 727):

> "With respect to Count One of the indictment, I charge you that but a single conspiracy is alleged • • • ."

What the proof actually showed was that the alleged payments in the *Pattullo Modes* and *Gotham Beef* cases were to procure decisions within the Fraud Bureau of the Internal Revenue, not to prosecute. The object to be accomplished in each case was expressly stated. Mr. Marks (*Pattullo* case) testified (R. 32):

> "He says all he could promise us that there would be a memorandum put into our file that the case was to be settled on a civil basis."

Mr. Tobias (*Gotham Beef* case) testified (R. 165-6):

> "Now, the exact terms of the escrow * * * was * * * that until I were to have heard with my own ears from the special agent's office from a responsible official there that was to be no criminal prosecution in the Gotham matter * * * the money was not to be released."

See also Berman's testimony (R. 144, 153-4).

The decision not to prosecute in the *Gotham Beef* case was announced in October, 1948 (R. 167) and the money released (R. 167, 169). The decision in the *Pattullo* case was announced January 10, 1949 (R. 37) and the money released a day or two later (R. 330-333).

Thereafter, nothing of significance occurred till the Congressional Committee began its inquiries in the summer of 1951 (R. 149, 170, 354-5). In June, 1950, Davis did enter into negotiations with one Glover about a pending tax case, but, on failure to agree on a price, the matter was dropped (R. 340-347).

In all of the evidence to this point there is just one item of direct evidence, as distinguished from hearsay, which tends to connect Grunewald with a particular deal. Davis says that, in October, 1948, he went with Halperin to an

office in Washington; that Halperin went to an inner room and later returned with Grunewald; that Halperin then introduced him and said (R. 327): "Irving, in the *Pattullo* case Mr. Grunewald has agreed to accept $100,000." Davis thanked him and Grunewald said, "O. K., O. K." (R. 328).

Assuming that this conversation suffices to connect Grunewald with a plan to obtain a corrupt decision not to prosecute in the *Pattullo* case, or even that it showed a willingness to do the same thing in other cases, there is still an enormous gap in the proof. There is no proof whatever in this of any plan to influence witnesses before a Congressional Committee or grand jury three to four years later. However reprehensible, the most that can be said is that a crime was planned and completed, in one case by October, 1948; in the second case by January, 1949; and even if we include the abortive Glover discussion, that was dropped in June, 1950.

So far as concerns a conspiracy to obtain corrupt revenue decisions, then, the last effort even to make a deal occurred in June, 1950.

Since the indictment was found October 25, 1954 (R. 1), prosecution was barred for any of these acts.

This was all perfectly plain to the Government before it drew the indictment. It was even clearer at the trial on the proof, for the Government there conceded that the only overt acts relied upon to avoid the statute were acts of concealment, viz. (R. 565):

> "The Court: Let me ask you on that, because this is an important part; What overt act occurred within three years prior to the indictment other than overt acts in connection with, let us say, concealment? Anything?
>
> Mr. Heffron: None, your Honor, but none are required."

How could they avoid the bar? The device chosen was the "continuing conspiracy to conceal" inserted as part of the original conspiracy. This device demands careful analysis, upon which it will be found clearly defective.

It is wrong in principle, as was demonstrated by the reasoning of this Court in *Krulewitch v. U. S.*, 336 U. S. 440 and *Lutwak* v. *U. S.*, 344 U. S. 604.

In the *Krulewitch* case, the defendant was charged with conspiring with a woman defendant to cause another woman to be transported from New York to Florida for purposes of prostitution. After the trip had been accomplished and the woman had returned to New York, all three were arrested. While in custody, one of the women supposedly said to the other, in effect, "Don't talk. It is better for us to take the blame than Krulewitch." Evidence of this conversation was admitted on the trial, which resulted in a conviction. On appeal the Government contended that the main conspiracy necessarily implied a subordinate conspiracy to conceal the principal crime and that the conversation was admissible against defendant, though after the event and not in his presence, as a declaration in furtherance of the subordinate conspiracy to conceal. This theory was sustained by the Second Circuit Court of Appeals. It was rejected by the Supreme Court which said, at page 443:

> "We cannot accept the Government's contention."

Again, at page 444:

> "We are not persuaded to adopt the Government's implicit conspiracy theory which in all criminal conspiracy cases would create automatically a further breach of the general rule against the admission of hearsay evidence."

Further dangers in the theory were pointed out in a concurring opinion of Mr. Justice Jackson, who said (p. 456):

> "It is difficult to see any logical limit to the 'implied conspiracy', either as to duration or means, nor does it appear that one could overcome the implication by express and credible evidence that no such understanding existed, nor any way in which an accused against whom the presumption is once raised can terminate the imputed agency of his associates to incriminate him. Conspirators, long after the contemplated offense is complete, after perhaps they have fallen out and become enemies, may still incriminate each other by deliberately harmful, but unsworn declarations, or unintentionally by casual conversations out of court. On the theory that the law will impute to the confederates a continuing conspiracy to defeat justice, one conceivably could be bound by another's unauthorized and unknown commission of perjury, bribery of a juror or witness, or even putting an incorrigible witness with damaging information out of the way.
>
> Moreover, the assumption of an indefinitely continuing offense would result in an indeterminate extension of the statute of limitation. If the law implies an agreement to cooperate in defeating prosecution, it must imply that it continues as long as prosecution is a possibility, and prosecution is a possibility as long as the conspiracy to defeat it is implied to continue.
>
> I do not see the slightest warrant for judicially introducing a doctrine of implied crimes or constructive conspiracies. * * *"

In *Lutwak* v. *United States*, 344 U. S. 604, several defendants were charged with conspiring to circumvent the United States Immigration laws by contracting spurious marriages in Europe with war veterans for the purpose

merely of gaining entry to the United States as veterans' spouses. The object of the conspiracy was accomplished by admission of the last of the defendants to the United States on December 5, 1947. No question of the statute of limitations was involved, but the point was whether certain acts of some of the parties after the last entry were admissible in evidence. The Government claimed the evidence was admissible upon the theory of a continuing agreement to conceal, alleging such agreement as part of the conspiracy. However, the Supreme Court held that there was no evidence of such an agreement to conceal and that termination of the conspiracy by accomplishment of its object on December 5, 1947, would have to be assumed. For other reasons it held that testimony concerning certain acts of one of the parties after the conspiracy was relevant to show the nature of the marriage.

In this case we are not concerned with such a question. We are concerned with the Supreme Court's repeated refusal to validate the idea of extending the conspiracy period by a subordinate conspiracy to conceal. In the *Krulewitch* case the Government tried to imply the agreement, but did not even allege it in the indictment. In the *Lutwak* case the Government alleged it in the indictment, but then tried to imply it evidentially from the fact that the parties were naturally concealing the true facts from the Immigration authorities. Such an implication likewise, the Court refused to sanction.

Illustrating this is the Court's comment upon the claim in the *Lutwak* case that evidence of attempts to conceal after the object of the original conspiracy had been accomplished warranted the inference that the original conspiracy included the agreement to conceal. The Court said (344 U. S. at page 616):

> "There was a statement of Munio Knoll in the record to one witness Haberman that indicated

> Munio's purpose to cover up and conceal the conspiracy. This is not evidence that the conspiracy included the further agreement to conceal. It is in the nature of an afterthought by the conspirator for the purpose of covering up. * * * "

The clear danger of destroying the statute of limitations by inferring an original agreement to conceal from efforts by one or more of the conspirators after the event to escape the clutches of the law was again referred to in the dissenting opinion in the *Lutwak* case, wherein three of the Justices of this Court said (344 U. S., at page 622):

> "We agree with the Court that the crime, if any, was complete when the alien parties obtained entry into the United States on December 5. We think this was the necessary result of the holding in *Krulewitch* v. *United States*, 336 U. S. 440, 93 L. ed. 790, 69 S. Ct. 716. This requires rejection of the Government's contention that every conspiracy includes an implied secondary conspiracy to conceal the facts. This revival of the long-discredited doctrine of constructive conspiracy would postpone operation of the statute of limitations indefinitely and make all manner of subsequent acts and statements by each conspirator admissible in evidence against all. But, while the Court accepts the view of Krulewitch, we think its ruling on subsequent acts and declarations largely nullifies the effect of that decision and exemplifies the dangers pointed out therein."

In the instant case there was no evidence of an agreement in 1947 and 1948 of a conspiracy to conceal the facts from future investigating bodies. There was evidence that, three to three and one-half years later, when congressional and grand jury investigations were under way, a series of covering up acts occurred.

The pertinent testimony is that the parties were at ease for several years at the end of 1948 and the beginning of

1949. Then, in the summer of 1951, Davis called Marks and said a Congressional Committee was investigating tax settlements and any investigators should be referred to Davis (R. 38). Shortly thereafter Mrs. Segel, a stockholder in Pattullo Modes, did make a statement to an investigator, which Davis recognized as dangerous to the company's accountant, Smith (R. 111-12 355-6). He again told her and Marks to refer future investigators to him (R. 356).

Davis then withdrew as the Pattullo Modes attorney and turned the client over to Mr. Boris Kostelanetz (R. 356-7). On the advice of Mr. Kostelanetz, they claimed their privilege when subpoenaed before the Committee (R. 41-3). From this point on, the Pattullo Modes group followed the advice of Mr. Kostelanetz and ultimately arranged a deal for immunity (R. 20-21, 41-5). Davis says that he asked them to check that advice with another lawyer before opening up the story, but that they never did (R. 362, 45). These facts were the basis of the substantive charge contained in the fifth count. Grunewald was acquitted by the Court of any implication therein (R. 569).

As to the Gotham Beef people, there were requests in late 1951 and early 1952 that Mr. Berman and Mr. Tobias stand silent (R. 149-50; 170-72). Whether this was merely a suggestion that they rely on their constitutional privilege or an attempt to influence them corruptly, as charged in the sixth and seventh counts of the indictment, it was certainly no more than an attempt at self preservation. Again, Grunewald was acquitted of any connection with those events, charged as substantive crimes in the sixth and seventh counts.

Even if we concede that these talks with the Gotham Beef people and the Pattullo Modes people, in late 1951 and early 1952, were sufficient to establish an attempt to influence witnesses, subpoenaed or to be subpoenaed before

the Brooklyn Grand Jury, the fact is still clear that those acts were not and could not have been in contemplation of the alleged conspirators back in 1948. Nor is there a particle of evidence that Grunewald ever knew, heard of or had anything to do with these events. The Trial Judge directed his acquittal on the substantive charges (counts 5, 6 and 7) based on these attempts (R. 569).

In connection with these events, there is a statement in the record which the Government has consistently misconstrued to attempt to involve Grunewald therein. They usually say that he knew about it and was helping in it. The Davis testimony was that, not during the grand jury period, but during the Congressional Committee period in the summer of 1951, the following occurred (R. 363):

> "Q. Going back to the original Congressional investigation, did you have any talks at or about that time concerning Mr. Grunewald?
>
> Mr. Aranow: With whom and where?
>
> Mr. MacMahon: Anywhere.
>
> A. We did. We asked Mr. Halperin wasn't there anything that Mr. Grunewald could help in and why doesn't he go to see him. He said he would not go to see him, that he was sure that Mr. Grunewald knows about it, and that if he was in a position to help that he would."

Thus the fact is that, far from Grunewald being involved, there was an express refusal even to talk to him about it.

The only item of importance particularly affecting Grunewald in respect of concealment or influencing witnesses to conceal is found in the testimony of Mrs. Hain. She testified she was employed by Grunewald as a part time secretary from June, 1949 to January, 1950 and from June, 1950 to February, 1951 (R. 526). On May 13,

1952, she received a subpoena to appear before the Grand Jury of the Eastern District of New York; immediately thereafter she had a conversation with Grunewald, who sent her expense money for the trip and told her she did not have to discuss his personal business and could just say she did not remember (R. 531-3). She did not purport to know anything about any of the cases under discussion. There is not the slightest suggestion in the evidence that anyone but Grunewald knew of the subpoena or that he discussed it with anyone else. It is perfectly plain that, whatever might be his personal responsibility for this incident, it was his individual act and, in substance, amounted to nothing more than a grumbling protest about snooping into his personal business by calling a lady who had been a part time secretary. It had no probative force whatever to establish an agreement during the life of the original conspiracy in 1948 to conceal those 1948 activities from all investigating bodies in the future.

What we are concerned with at the moment is to show that none of the testimony in any wise supported the charge in the indictment of an original agreement to conceal the fact from investigating bodies in the future. The evidence demonstrated only nervousness on the part of people who were being investigated and who did the most natural thing in the world, namely, tried to cover up. The very argument said to have been presented to the Pattullo people or the Gotham people, that they ought to remember that a good turn was done for them and should stand silent, demonstrates that there was no original agreement to obstruct justice for all the future.

There was, accordingly, a clear failure to prove the charge in the indictment that the original conspiracy included a conspiracy to influence witnesses before the Congressional Committee and grand jury and an overt act

in furtherance thereof within three years prior to the date of the indictment. The defendants were entitled to an acquittal on the first count.

The Trial Court's view was that, to convict, since there was only one conspiracy alleged, it must be established beyond a reasonable doubt that the conspiracy included an agreement to conceal and that an overt act must have taken place within the three years prior to October 25, 1954. Where he differed with us was in permitting the jury to infer, from acts of concealment occurring three and one-half years after the main conspiracy ended, that the main conspiracy had included a subordinate conspiracy to conceal, which would extend the life of the conspiracy. He charged (R. 732):

> "You will recall that the indictment states, among other things, that it was part of the conspiracy that the defendants and co-conspirators would make 'continuing efforts to avoid detection and prosecution by any governmental body, executive, legislative, and judicial of tax frauds perpetrated by the defendants and co-conspirators though the use of any means whatsoever, including but not limited to . . . the influencing, intimidating, and impeding of prospective witnesses to refrain from disclosing the true facts.' (fol. 750). In other words, the indictment alleges that the conspiracy comprehended within it a conspiracy to conceal the true facts from investigation, should investigation thereafter eventuate. This is an important element of the first count of the indictment which you must take into consideration, inasmuch as the Statute of Limitations on the charge of criminal conspiracy is three years and unless the conspiracy was continuing to a period within three years prior to the date of the indictment, October 25, 1954; and some overt act was performed within that three-year period,

> the crime, if any, alleged in the first count of the indictment would be outlawed. It is the contention of the government that the conspiracy did not end when the taxpayers were advised that there would be no criminal prosecution recommended by the Special Agent's office, but that an integral part of the entire conspiracy was an agreement to conceal the acts of the conspirators and that when thereafter an investigation was started by Congress and by the Grand Jury in the Eastern District of New York, the conspirators performed overt acts in pursuance of the original conspiracy designed to conceal the true facts; and that these acts occurred within three years prior to the date of the indictment. On this issue, it will be necessary for you to determine whether, beyond a reasonable doubt, you can conclude that the conspiracy was of the nature described in the first count of the indictment and comprehended an agreement to conceal and whether some overt act took place in the period of three years prior to October 25, 1954 to carry out such purpose of the conspiracy."

and continued (R. 733-4):

> "To determine whether certain of the alleged overt acts were in furtherance of the object of the conspiracy, you have to determine the duration of the conspiracy. Did it end when the Pattullo Modes people and the Gotham Beef people received an assurance of no prosecution from the Bureau of Internal Revenue, or was a part of the conspiracy a continuing agreement to conceal the acts done (fol. 752) pursuant thereto? In determining whether a part of the conspiracy was an agreement to continue to conceal the illegal acts after their consummation, you may not imply that such an agreement was part of the conspiracy. You would have to find from the evidence of the acts and declarations of the co-

conspirators that there was an understanding or agreement to conceal the conspiracy. If you find that such an agreement or understanding to conceal the conspiracy was not a part of the conspiracy to defraud the government, but no more than an afterthought brought to the surface when the co-conspirators were confronted with the Grand Jury and King Committee investigations, then you must find, as a matter of law, that the defendants are not guilty of the crime charged in the first count of the indictment. If you find that the evidence shows, beyond a reasonable doubt, that as a part of a conspiracy to defraud the government, there was an agreement or understanding to conceal the illegal acts and that this too was an objective or part of the conspiracy, then you may find that such understanding was a part of the conspiracy. However, you must additionally determine whether this objective of the conspiracy was known to the defendants. If this objective was known originally by only part of the conspirators but thereafter during the existence of the conspiracy, the scope of the conspiracy was extended so as to include such an agreement to conceal, and if you find that some of the defendants did not know of the expansion to include the agreement to conceal, you may not impute to them the knowledge of their co-conspirators and they could not be found guilty of the crime charged in Count One."

In short, the Court's charge required that, before the conspiracy to defraud was accomplished, there must have been added to it a conspiracy to conceal or else the defendants must be acquitted under the first count by virtue of the three year limitation. This was the whole theory of the indictment, that there was but one conspiracy. In any event, however, his charge became the law of the case and conviction on no other basis could be allowed to stand.

(*Bollenbach* v. *United States*, 326 U. S. 607; *Kotteakos* v. *United States*, 328 U. S. 750).

This was acknowledged by all of the members of the Court below. The majority opinion, after quoting from the above portion of the charge, said (Appendix V, p. 301a):

> "Accordingly, if there was insufficient evidence to support the above quoted portion of the Judge's charge, we must reverse."

As we have shown, the proof did not permit an inference that there was such an agreement to conceal within the life of the main conspiracy. The petitioner, should, therefore, have been acquitted upon the first count. We requested such acquittal at the close of the government's case (R. 546-51); again at the close of the whole case (R. 710); and both such motions were denied (R. 569, 710); as also were motions to set aside the verdict (R. 766, 778-80). We also asked an instruction to the jury, number 23 (R. 771), which would have eliminated the question of concealment, but it was refused, with an exception (R. 713). The failure to grant the motion to acquit should be corrected here.

Reasoning of the Court below.

The answer of the majority opinion below was that it was possible to find that the conspiracy to escape punishment or conceal existed within the life of the original conspiracy to defraud, so that the Statute of Limitations was not a bar. This answer rests upon several errors.

(a) First, it is said (Appendix V, p. 302a), that what the conspirators had to sell was "freedom from criminal prosecution", which freedom was to run for the whole period of the Statute of Limitations against the tax payers Pattullo Modes and Gotham Beef. The Court treats the official announcement that there would be no criminal prosecution as merely the delivery of a substantial installment

of what appellants agreed to deliver for the huge sums paid. It says, "The six year Statute of Limitations (26 U. S. C. [1940 ed.] §3748) did not run in favor of the tax payers until sometime after the commission of the overt acts relied upon."

(b) Next, it is said that ordinary steps to avoid detection, while the main crime was in progress, showed a purpose to conceal (Appendix V, p. 303a).

(c) Finally, the Court says that the conspirators "must have known from the outset that the success of their enterprise was in real danger at all times" (Appendix V, p. 304a).

ERRORS IN THEORY OF COURT BELOW.

(a) The main premise, that the object of the conspiracy was that the tax payers were to be protected from criminal prosecution throughout the period of the Statute of Limitations applicable against them, was without basis in the evidence. No such testimony was given or suggested. The Pattullo Modes people were particularly told that all that could be done was to get a no prosecution ruling. Under normal administrative practice, any such ruling along the line terminated the matter (R. 294-296). When they obtained such a ruling, they paid. In the *Gotham Beef* case, the point was even more particularly stated, namely, that an official of the Bureau was to personally state within the hearing of the accountant for the Gotham Beef Company, that the decision was not to prosecute. Then the Gotham Beef money was paid. To say that this testimony permits an inference, that the object of the conspirators was to insure immunity for a period of years bounded by the Statute of Limitations, is to distort the matter beyond reasonable inference.

Furthermore, continuance of a conspiracy must be shown by evidence. No evidence appeared here of any act done

after January, 1949, to help these taxpayers avoid prosecution.

Moreover, no such theory was submitted to the jury.* As will be seen from the above quoted portion from the Judge's charge, the Trial Judge put the issue to the jury, as a determination whether the conspiracy to defraud ended in January, 1949 with the announcement of the no prosecution decision, or whether it included, in addition, a conspiracy to conceal, which would carry its life down to the period within three years prior to this indictment.

Judge Frank pointed this out in his dissenting opinion filed on the motion for a rehearing. He gave his notion of what the charge would have had to be in such a case (Appendix V, p. 384a) and then said (Appendix V, p. 385a):

> "Under the charge as given, however, it was not essential that an objective of the original conspiracy was to prevent prosecution of the taxpayers for tax

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* Nor was any separate conspiracy submitted to the jury. The harmful effect of submitting as one conspiracy, two conspiracies, the first of which was barred by limitations, and the lack of proof to support any other theory, was called to the Court's attention in support of motions for judgment and motions to strike and to sever (R. 549-50, 559) and exceptions were taken to the failure to distinguish between different conspiracies and to the submission to the jury of the issue of concealment (R. 752-753, 757). On the same subject, Judge Frank in his dissenting opinion (App. V, 389a) said:

> "It could serve, at most, to prove a new conspiracy to conceal an older conspiracy. In that event (although such a new conspiracy would be evidence of the older conspiracy) the defendants could not, on such evidence, be convicted of the older conspiracy which ended in 1949, since the statute of limitations would have run against the older three years after 1949. See *U. S.* v. *Siebricht*, 59 F. 2d 976, 978 (C. A. 2) to the effect that an old conspiracy "could not be revived by the breath of a new and different conspiracy * * *". The defendants were not indicted for such a new conspiracy, and the judge's charge precluded a conviction based thereon. See, e.g., *U. S.* v. *Siebricht, supra.*"

> evasion until the six year statute of limitations had run against such prosecution, but it sufficed under the charge if the jury found (1) that the conspiracy included an implied agreement or understanding to conceal the conspiracy for any purpose, plus (2) an overt act of concealment committed by any of the defendants at any time—even an overt attempt by one of the defendants to save himself from prosecution."

Again, it is evident from admissions of the government, that there was no proof of the continuance of the main conspiracy to defraud down to the period within three years prior to indictment. This appears from the discussion with the Court (R. 565) when the Court asked whether there was any proof of any overt act within three years prior to the indictment other than an overt act of concealment. The answer given was "none". It was crystal clear that the only thing that the government was relying upon, to extend the life of the original conspiracy, was a conspiracy to conceal as a part of the main conspiracy.

(b) As to the second reason advanced by the majority opinion, to wit: that ordinary acts to avoid detection are sufficient to justify the charge of a continuing conspiracy to conceal, the fallacy lies in two elements. We will assume that a man committing a crime walks softly, seeks a by-way, takes cash instead of checks, uses an alias and warns his confederates to "keep this under your hat". These normal incidents of escaping detection, of course, look both to the accomplishment of the crime and the avoidance of the penalty. It does not reasonably follow, however, that this connotes future confederation and mutual dependence and responsibility forever, after the immediate criminal object has been attained. Any other ruling would make

joint criminals conspirators for life, a bond which could not be broken, save by public confession.

In any event, an overt act sufficient to toll the statute of limitations must be, in the words of the statute, Section 371, an "act to effect the object of the conspiracy." With the accomplishment of this object, a simple act of concealment cannot be said to be an act to effect the object. It may be part of some new and different conspiracy, with other criminal objects. But, as to the attained object, it can no longer be effective. The overt act "cannot succeed the completion of the contemplated crime" (*Hall* v. *United States*, 109 F(2d) 976, C. A. 10). "There can be no furtherance of a conspiracy that has ended." (*Lutwak* v. *United States*, 344 U. S. 604, 617-18). Hence an act of concealment does not extend the statute on the completed conspiracy.

(c) Finally, the third point advanced below to the effect that the conspiracy to conceal existed as part of the main conspiracy because the appellants "must have known" that the success of their enterprise was always in danger and must have apprehended the possibility or likelihood of an investigation, was nothing more than the argument already rejected by this Court in *Krulewitch* v. *U. S.*, 336 U. S. 440, that every criminal conspiracy includes an implied subordinate conspiracy to do anything necessary to escape punishment. To say that the conspirators must have known of danger and must have inferred the possibility of investigation, simply presents the implied conspiracy theory in another guise.

Judge Frank, discussing these matters, said (Appendix V, p. 385a) "As I shall try to show below, overt acts of concealment, without more, cannot suffice to prove that an ordinary conspiracy included an agreement to conceal". He further said, upon the assumption that the conspiracy ended in 1949, (Appendix V, p. 385a):

> "* * * the record contains no evidence, other than overt acts of concealment, reasonably warranting an inference of an agreement to conceal as a part of the conspiracy. Therefore, any such agreement could only have been implied from the mere existence of the conspiracy itself; and any jury is very likely to conclude that when men enter into an illegal agreement, for which they can be prosecuted, they implicitly understand, as part of that agreement, that they will do those acts necessary to conceal their crime from the prosecuting authorities."

He went on to point out that such a finding runs afoul of the ruling in the *Krulewitch* case.

Judge Frank tried to find evidence of any acts which might have been done within the three years before the indictment, the object of which could have been to prevent prosecution of Pattullo Modes or Gotham Beef for their tax evasion. He lists a number of acts (Appendix V, footnote pp. 382a-383a) for consideration. His point is that, if there were such acts, then it might be possible to submit to a jury in the future the theory advanced by the majority opinion, that the conspiracy envisioned protecting Pattullo Modes and Gotham Beef throughout the entire period of the Statute of Limitations. Judge Frank lists in this footnote eight items, several of which he throws out summarily as clearly designed only to protect the conspirators. However, a review of all eight items shows that they all refer to individual acts occurring during the period of the Congressional Committee or Grand Jury investigations, and that none of them could reasonably be said to have been designed to avoid the prosecution of Pattullo Modes and Gotham Beef for tax evasion. And, as we have said, the government admitted that it had nothing within three years except an act of concealment.

It is submitted, therefore, that, neither under the theory of the indictment, as the case was submitted to the jury, nor on the theory contained in the majority opinion, which was not submitted to the jury, can this conviction be sustained. The proof was simply barren of evidence that during the life of the main conspiracy there was any conspiracy to conceal, which could toll the statute. On the law the defendants were entitled to an acquittal under the three year bar.

II.

It was error for the Trial Court to submit the incident between petitioner and his former secretary as a possible overt act in a continuing conspiracy to conceal.

We have already detailed what occurred between the petitioner and his former secretary when she received a subpoena for the Grand Jury in May, 1952. The Court charged that this could be an overt act in a continuing conspiracy to conceal sufficient to prevent the running of the statute of limitations (R. 733). The Court said:

> "You have heard testimony from the girl who had been the defendant Grunewald's secretary that when she was subpoenaed before the Brooklyn Grand Jury, Grunewald talked to her on the telephone and indicated that she need not answer certain questions, and that she should answer questions by saying that she forgot.
>
> "Were these overt acts in pursuance of the conspiracy? An overt act is defined, as a matter of law, as any act done to effect the object of the conspiracy. To be an overt act, it must be in furtherance of the object of the conspiracy, although standing by itself,

> it need not be a criminal act. The Statute of Limitations does not begin to run on a conspiracy indictment until after the last overt act done by a co-conspirator to carry out an objective of a continuing conspiracy."

Our exception (R. 757) was overruled (R. 762).

Since there was no proof of such an agreement to conceal, and since there was no connection between this incident and any other person in the case, it could not properly be regarded as an overt act in a conspiracy to conceal.

III.

It was error to permit impeachment of defendant Halperin for having claimed his constitutional privilege before the grand jury.

We rely upon the brief filed on behalf of petitioner Halperin (No. 184) on this subject.

The error, in permitting destruction of Halperin's credibility, likewise destroyed the major defense on the facts. Davis had implicated petitioner Grunewald by recounting an introduction by Halperin to Grunewald in October, 1948, —wherein Halperin is alleged to have said that Grunewald had agreed to accept $100,000 in the *Pattullo* case and Grunewald to have said "O.K." (R. 327-8). Without this evidence, there would have been no competent evidence sufficient to bring in Grunewald. Halperin denied this incident categorically (R. 631, 640). As Judge Frank pointed out, Halperin, if believed, could have been acquitted (App. V. 329a). Likewise this petitioner.

For the error as to Halperin's cross examination, fully objected to (R. 684-703), a new trial at least would be necessary.

Conclusion.

The judgment should be reversed and petitioner acquitted on the first count, or, in the alternative, a new trial should be awarded.

Respectfully submitted,

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